INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
The question is substantial	7
Conclusion	11
Appendix A, notice of appeal by Interstate Commerce Commission	12

CITATIONS

Cases:

Arrow Transportation Co. v. *Southern Ry. Co.*, 372 U.S. 658	7, 8, 9, 10
City of Chicago v. *United States*, 396 U.S. 162	2
National Small Shipment Traffic Conference v. *United States*, 321 F. Supp. 500	8, 9
Transit Charges, Southern Territory, 332 I.C.C. 644, sustained *sub nom. Cincinnati N.O.&T.P. R. Co.* v. *United States* (unreported) (S.D. Ohio), aff'd 400 U.S. 932	6

Statutes:

28 U.S.C. § 1253	2
28 U.S.C. § 1336	5
28 U.S.C. § 2101(b)	2
Interstate Commerce Act	
Section 15(7), 49 U.S.C. § 15(7)	2, 5, 7, 9, 10
Section 216(g), 49 U.S.C. § 316(g)	8

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

On Appeal from the United States District Court for the District of Kansas

---

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (Railroad J.S. App. C)[1] is not yet reported. The report of Division 2 of the Interstate Commerce Commission (Railroad J.S. App. A) is published at 339 I.C.C. 364, and was affirmed by a report of the entire Commission (Railroad J.S. App. B) published at 340 I.C.C. 69.

[1] "Railroad J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Atchison, Topeka & Santa Fe Railway Company et al., in the companion appeal from the same district court judgment, No. 72-214.

JURISDICTION

The opinion of the three-judge district court was entered on May 24, 1972. Appellant filed a motion for amendment of opinion on May 31, 1972. On June 8, 1972, the district court entered its order affirming the previous opinion and denying motion for correction (Railroad J.S. App. D). The Interstate Commerce Commission filed its notice of appeal on July 20, 1972 (App. *infra* pp. 12-13). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). *City of Chicago* v. *United States*, 396 U.S. 162.

QUESTION PRESENTED

Whether a three-judge district court has power to suspend and make ineffective, until and unless otherwise ordered by that court, railroad charges which the Interstate Commerce Commission had found to be just and reasonable after suspension for the maximum period authorized by statute, simply because the court has held that the case must be remanded to the Commission for additional findings in support of its conclusion that the charges are lawful.

STATUTE INVOLVED

Section 15(7) of the Interstate Commerce Act, as amended (49 U.S.C. 15(7)), provides as follows:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual

or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such

amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

STATEMENT

By this appeal the Interstate Commerce Commission seeks summary reversal of that part of the lower court's decision which suspended and made ineffective railroad charges for services relating to the in-transit inspection of grain "until and unless otherwise ordered by this Court." (Railroad J.S. App. C7). This action was taken in conjunction with the court's remand of the case to the Commission for further proceedings consistent with its opinion. No appeal is taken from the remand.

This case began when the nation's railroads[2] filed

[2] The railroads involved are listed in Appendix G to the Railroad Jurisdictional Statement.

tariffs with the Commission, proposing new railroad charges for services in connection with the in-transit inspection of grain. The Commission instituted an investigation under § 15(7) of the Interstate Commerce Act (49 U.S.C. § 15(7)) and suspended the charges for the maximum seven-month period authorized by the statute. After the suspension period was voluntarily extended by the railroads involved for approximately six additional months, a Division of the Commission issued its report and order finding the charges to be just and reasonable and otherwise lawful (Railroad J.S. App. A1-A58). In support of its conclusion the Division found, *inter alia*, that imposition of the charges would deter use of the inefficient and time-consuming in-transit inspection procedure, which would "make a substantial contribution toward the improvement of the national freight car supply" (Railroad J.S. App. A51). The charges went into effect on May 4, 1971, and have been in effect since that time.

After issuance of a second report and order by the entire Commission affirming the Division, appellees filed this action under 28 U.S.C. 1336 to enjoin and set aside the Commission's orders. The district court, holding that the Commission failed to make adequate findings and to explain adequately its departure from "prior norms", remanded the matter to the Commission for further proceedings consistent with the court's opinion (Railroad J.S. App. C7).[3]

[3] The alleged "norm" to which the district court refers is the principle, observed by the Commission in some prior cases.

In addition—notwithstanding that appellees never requested such relief—the court also, without discussion of its power to do so, ordered that the inspection charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (Railroad J.S. App. C7).

Following entry of the district court's opinion, both the Commission and the railroads filed motions requesting the court to delete the last sentence of its opinion which imposed the suspension. By order entered June 8, 1972, the lower court denied the motions, holding that "the opinion as originally filed represents the considered judgment of the Court" (Railroad J.S. App. D2).

On June 9, 1972, the railroads filed their notice of appeal to this Court.[4] A motion for stay of judgment pending appeal was simultaneously filed in the district court and was subsequently denied. The railroads then applied to this Court for a stay, which was granted on July 7, 1972, subject to an accounting and a refund provision (Railroad J.S. App. F).

---

that a new separate charge, when assessed for services formerly included within a line-haul rate, will be approved only when the charge plus the applicable line-haul rate without the service included is found to be just and reasonable. See, *e.g.*, *Transit Charges, Southern Territory*, 332 I.C.C. 644, sustained on other grounds *sub nom. Cincinnati N.O. & T.P. R. Co.* v. *United States* (unreported) (S.D. Ohio), *aff'd* 400 U.S. 932.

[4] Docketed on August 7, 1972, as *Atchison, T. & S.F. Ry. Co., et al.* v. *The Wichita Board of Trade, et al.*, No. 72-214 (O.T. 1972). The railroads' appeal is from the entire district court decision.

The Commission filed its notice of appeal on July 20, 1972 (App. A, *infra*, pp. 12-13).

THE QUESTION IS SUBSTANTIAL

By itself purporting to suspend the in-transit charges until further order of the court, the court below acted in direct contravention of this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658. This Court held in *Arrow* that the exclusive power to suspend rates under § 15(7) rests in the Commission, and that the Courts lack power to suspend rates or to extend Commission suspension beyond the maximum period provided by the statute. Construing § 15(7), the Court held that Congress, by fixing the period in which the Commission might suspend rates, must have intended to foreclose judicial power to extend that period (372 U.S. at 664). As the Court stated:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. [372 U.S. at 667]
>
> * * * *
>
> There is, of course, a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates, a jurisdiction to which this Court had, even in 1910, already given the fullest recognition. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 [footnote omitted].

> This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive. [Id. at 668.]

Here the lower court exercised the very power which this Court in *Arrow* held that it could not exercise.

Arrow, of course, differs factually from the instant case in that there the judicial suspension of rates was sought while the case was still pending before the Commission in the first instance, while here the suspension has been imposed while the case is pending before the Commission on remand. But, as Judge Friendly recognized in *National Small Shipments Traffic Conference* v. *United States*, 321 F. Supp. 500 (S.D.N.Y.), this is not a material difference such as would negate application of the *Arrow* rule. In a decision directly in conflict with the case at bar, the district court in *National Small Shipments*,[5] after reviewing a final Commission decision upholding certain rates and finding it invalid, considered the question of its power under *Arrow* to order the rates suspended pending reconsideration by the Commission, and concluded (321 F. Supp. at 515):

> The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agree-

[5] The *Small Shipments* case involved § 216(g) of the Act (49 U.S.C. 316(g)), which applies to motor carriers. The statutory suspension language of § 216(g) is the same as that of § 15(7).

> ment; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, Arrow Transp. Co. v. Southern Ry., 327 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. We see no relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. In neither situation can we direct the Commission to reinstitute a suspension which had already continued as long as Congress allows.

We submit that Judge Friendly's analysis is plainly correct. As this Court recognized in *Arrow*, Section 15(7) represented a carefully considered Congressional judgment that the implementation of a new rate structure should be, in essence, a matter entrusted to the judgment of carrier management, subject only to a specifically delineated power—vested in the Commission alone—to delay such implementation for a maximum period of seven months. The rates thus implemented may, to be sure, subsequently be found unlawful and the carriers required, if the Commission so orders, to refund any excess charges collected in the interim (*Arrow*, *supra*, 372 U.S. at 666). But whether to run the risk of having to make such a refund, by implementing a rate change after the seven-month suspension period but before

the lawfulness of the rate change has been finally determined, is a business decision to be made by the carrier, which is free under the statute to collect the new charge unless and until it is finally adjudged unlawful.

By suspending the new in-transit charges "until and unless otherwise ordered by this Court" (Railroad J.S. App. C7), the court below has literally ignored the procedure carefully delineated by Congress in Section 15(7). The new charges have by no means been adjudged unlawful; indeed the lower court, while remanding the case to the Commission for failure to explain "its departure from prior norms" (Railroad J.S. App. C6), emphasized that "there may be facts and circumstances justifying a Commission reversal of" those norms—thus leaving open the possibility that the new charges may yet be found, either on the existing record or on the basis of additional evidence, to be just and reasonable. Yet its suspension order would prohibit the carrier from continuing to collect those rates—which have now been in effect for over 15 months—unless and until they are finally adjudged lawful by both the Commission and the Court. Plainly, such an order is in direct derogation of the statutory scheme as interpreted by this Court in *Arrow*, and is entirely improper.

CONCLUSION

Insofar as the judgment of the court below suspended and made ineffective the in-transit inspection charges until further order of that court, it should be summarily reversed.

Respectfully submitted,

FRITZ R. KAHN,
General Counsel,

BETTY JO CHRISTIAN,
Associate General Counsel,

HANFORD O'HARA,
Attorney,
Interstate Commerce Commission,
Washington, D. C. 20423.

September, 1972

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4730

[Filed July 20, 1972, Arthur G. Johnson, Clerk
By /s/ Helen Hope, Deputy]

THE WICHITA BOARD OF TRADE, et al., PLAINTIFFS

and

EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., INTERVENING DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Interstate Commerce Commission, one of the defendants herein, hereby appeals to the Supreme Court of the United States from the opinion of this Court filed May 24, 1972, and from the final order of this Court affirming the previous opinion and denying motion for correction filed June 8, 1972. This appeal is taken pursuant

to Sections 1253 and 2101 of Title 28, United States Code.

This the 19th day of July, 1972.

BETTY JO CHRISTIAN
Associate General Counsel

HANFORD O'HARA
Attorney
Interstate Commerce Commission
Washington, DC 20423

FRITZ R. KAHN
General Counsel

Attorneys for the Interstate Commerce Commission

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 470121 150